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SEC Guidance Under The JOBS Act

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Since the enactment of the Jumpstart Our Business Startups Act, the Division of Corporate Finance of the SEC has issued three sets of Frequently Asked Questions related to the JOBS Act, addressing general questions related to emerging growth company ("EGC") status and the IPO on-ramp, scaled disclosure and other provisions of the JOBS Act benefiting EGCs; confidential staff review of registration statements pursuant to new Section 6(e) of the Securities Act of 1933; and changes to requirements for registration and deregistration under the Securities Exchange Act of 1934. The following is an overview of the key guidance provided in the FAQ releases. Our prior Practice Update discussed the significant aspects of the JOBS Act.

Determination of Emerging Growth Company Status

The JOBS Act provides that an issuer may not qualify as an EGC if its first sale of common equity securities pursuant to an effective registration statement occurred on or before December 8, 2011. The limitation may arise not only from a filing related to a primary initial public offering but also from a resale registration statement or an employee benefit plan registration on Form S-8. However, if no sales occurred on or prior to the cutoff date, an issuer can qualify even if a registration was then effective. The determination of whether an issuer's gross revenues were less than $1 billion during its most recently completed fiscal year will be made under U.S. GAAP (or IFRS as issued by the IASB, if adopted by a foreign private issuer).

EGC status for purposes of making test-the-waters communications to QIBs and institutional accredited investors in reliance on Section 6(d) of the Securities Act should be determined at the time of each communication. Brokers and dealers distributing research reports about EGCs in reliance on amended Securities Act Section 2(a)(3) should determine EGC status at the time the research report is distributed.

Confidential Submission of Draft Registration Statements

EGC status must be determined at the time of submission if an issuer seeks to submit a draft registration statement for confidential staff review. If the issuer ceases to be an EGC during the confidential review

process (for example, because it completes a fiscal year in which its gross revenues equals or exceeds $1 billion), a registration statement will be required to be publicly filed. The date of a public filing, and not the date of a confidential draft submission, will be the "initial filing date" for purposes of Securities Act Rule 401(a), which provides that the form and content of a registration statement must conform to the rules in effect on the initial filing date for the registration statement. Accordingly, issuers that believe they may cease to be EGCs before review of a confidential submission is completed may wish to file publicly before it would otherwise be required to do so in order to preserve the benefit of scaled disclosure requirements related to the registration statement.

An issuer that has had registered sales of securities other than common equity securities can qualify to use the confidential submission process as long as it otherwise qualifies as an EGC.

For purposes of determining whether the requisite 21-day period has elapsed between the public filing of confidentially submitted registration statements and the commencement of a road show, the staff has indicated that it will not object if test-the-water meetings with QIBs and institutional accredited investors are not treated as part of a road show. However, a public filing will be required to take place 21 days before any test-the-water communications that are not limited to QIBs and institutional accredited investors, even if they do not constitute a traditional road show.

If a foreign private issuer chooses to take advantage of any benefit available to EGCs, it will be required (as are domestic EGCs that submit confidential registration statements) to publicly file its confidential submissions at least 21 days before its road show. If a foreign private issuer chooses not to take advantage of any EGC benefits, it will be permitted to follow existing staff practices regarding confidential submissions by foreign private issuers, which do not require that 21 days elapse between the public filing of the registration statement and the road show but that since December 2011 have generally been limited to foreign governments registering debt securities; foreign private issuers that are listed or are concurrently listing securities on a non-U.S. securities exchange; foreign private issuers that are being privatized by a foreign government; and foreign private issuers that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

An issuer submitting a draft registration statements confidentially should advise the staff at the time of submission whether it will elect scaled disclosure relating to the adoption of new or revised accounting standards (an election that must be complied with for the entire period the issuer remains an EGC). Even if scaled disclosure is adopted, the date of applicability to non-EGCs and the anticipated date of adoption by the EGC (assuming it remains an EGC as of such date) should be disclosed for each applicable

accounting standard.

An EGC is not required to submit a draft registration statement under cover of a Rule 83 confidentiality request in order to preserve confidentiality. Each draft registration statement and amendment should be filed as a separate 99-series exhibit to the first public filing of the registration statement.

Amendment of Previously Filed Registration Statements; EGCs that are Existing Reporting Companies

An issuer that qualifies as an EGC may, on either a pre-effective or post-effective basis, amend a registration statement filed prior to April 5, 2012 (the date of enactment of the JOBS Act) to provide the scaled disclosures available to EGCs. Similarly, an issuer that completed its IPO after December 8, 2011 but before April 5, 2012 may file periodic reports using the scaled disclosure provisions of the JOBS Act.

An issuer that is in registration or is a reporting company should disclose whether or not it is electing scaled disclosure relating to the adoption of new or revised accounting standards in their next registration statement amendment or publicly filed report, as applicable.

Other Foreign Private Issuer Considerations

As noted, the determination of whether a foreign private issuer's gross revenues were less than $1 billion during its most recently completed fiscal year will be made under IFRS as issued by the IASB, if adopted by a foreign private issuer. Foreign private issuers reporting in a currency other than U.S. dollars should calculate gross revenues in U.S. dollars using the exchange rate as of the last day of the most recently completed fiscal year.

The staff clarified that it will not object if a qualifying foreign private issuer uses the scaled disclosure provisions for EGCs in preparing filings on the basis of Form 20-F even though the JOBS Act refers only to Regulation S-K and not the corresponding items in Form 20-F.

Canadian issuers filing under MJDS may qualify as EGCs. Disclosure requirements will continue to be established under home country standards but other provisions of the JOBS Act such as those permitting test-the-waters communications and deferral of internal controls attestation pursuant Sarbanes-Oxley Section 404(b) will be available to an MJDS filer that qualifies as an EGC.

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Exchange Act Registration and Deregistration

If an issuer (other than a bank holding company) triggered a Section 12(g) registration obligation as of a fiscal year-end before April 5, 2012 but would not trigger the obligation under the amended holders-of-record threshold contained in the JOBS Act and the Section 12(g) registration has not been completed, the issuer is no longer subject to the Section 12(g) registration obligation and need not file an Exchange Act registration statement. If the issuer has filed an Exchange Act registration statement that is not yet effective, the issuer may withdraw the registration statement.

The revised registration thresholds are interpreted by the SEC staff to eliminate Section 12(g) registration requirements for bank holding companies determined as of any fiscal year-end prior to April 5, 2012. If a bank holding company has filed an Exchange Act registration statement that is not yet effective, it may be withdrawn. If a bank holding company has registered a class of equity security under Section 12(g), it may terminate the registration by filing a Form 15 if the security is held by less than 1,200 persons (consistent with the JOBS Act revision to Section 12(g)(4) of the Exchange Act). Unless the bank holding company is eligible to deregister under Rule 12g-4, however, which has not yet been amended to incorporate the new 1,200 holder deregistration threshold for bank holding companies, the bank holding company would have to continue comply with Exchange Act reporting obligations for 90 days after filing a Form 15. A bank holding company deregistering now should include an explanatory note in its Form 15 disclosing that it is relying on Section 12(g)(4) of the Exchange Act, as amended by the JOBS Act.

An issuer that deregisters equity securities under Section 12(g) must consider any reporting obligations under Section 15(d) of the Exchange Act, which are suspended while a Section 12 registration is in effect but otherwise must be complied for each fiscal year unless, for a fiscal year other than one in which a Securities Act registration became effective (or during which a Securities Act registration statement is updated pursuant to Section 10(a)(3) of the Securities Act), there were fewer than 300 holders of record or, for a bank holding company, as a consequence of the JOBS Act amendments, 1,200 holders of record at the beginning of such fiscal year.

Issuers may exclude present and former employees who received securities pursuant to an employee compensation plan in transactions that were exempt from the registration requirements of Section 5 of the Securities Act even though the safe harbor provisions the SEC has been directed to adopt for this purpose has not been promulgated.

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legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.